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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 441st MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 11 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.50 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN said that, at the preceding meeting, there had been a trend towards accommodating the idea of a conditional payment order with certain modifications - although the Working Group, after a prolonged debate, had favoured a requirement of unconditionality. In the light of the Mexican proposal, it had become apparent that the existing text, in particular the wording "subsequently satisfied and thereafter" in the last paragraph of article 2(b), might give rise to problems, if it later became apparent that the condition to which a payment was subject had not been satisfied.

2. One of the objects of the Mexican proposal had been to take care of that problem. However, the observer for Finland had drawn attention to another possible difficulty, namely, the situation in the event of a payment order being executed without regard for the conditions specified. He was not certain that the Mexican proposal solved that problem.

3. Mr. ABASCAL ZAMORA (Mexico), referring to the question of the Model Law applying only if the relevant conditions had been subsequently satisfied, said that the problem of uncertainty was serious, because the parties to the transfer would not know whether the conditions had been satisfied or not and whether, therefore, they had obligations and protection under the Law or not.

4. Regarding the problem raised by the observer for Finland, he did not agree that a solution could not be found. If, for example, a person instructed a bank to execute a payment order provided that a certain condition was fulfilled, he thereby set up a contract with his bank that was governed by another law, not the Model Law. The bank, if it accepted that contract, had an obligation to carry out the instruction, otherwise it would be responsible under the terms of that other law. If a bank receiving a conditional payment order did not fulfil the conditions, it was not respecting its contract with its client. The Model Law was not concerned with the responsibility of a bank which violated a conditional payment order: that came within the scope of another law.

5. The CHAIRMAN said that it was surely intended that the Model Law should take care of such a situation, rather than leaving it to another law.

6. Mr. ABASCAL ZAMORA (Mexico) said that the problem was outside the law on credit transfers, which did not deal with conditions, because there was always uncertainty as to whether conditions had been satisfied or not. The question whether a bank had failed to meet conditions must therefore come under another law.

7. Mr. GREGORY (United Kingdom) said that the Commission was rediscussing a number of prior decisions and trying to find ways of reconciling different elements.

8. The first such decision, which was clearly expressed in the opening words of the definition of "payment order", was that, in order to be subject to the Model Law, payment orders should be unconditional. The Commission still adhered to that principle, but its members had agreed that, once a payment order which had started as a conditional order entered the system governed by the Model Law, it should be governed by the rules of the Model Law and the parties - particularly the originator - should have the rights and obligations for which the Law provided. The difficulty was to decide the precise moment at which what had once been a conditional payment order was to be treated as unconditional and what adjustments should be made to the rights and obligations.

9. As it stood, article 2(b) provided that the relevant moment came when the condition had been satisfied and the bank had executed the instruction. But, as pointed out by the Chairman, the fact that mention was made of satisfying the condition, which brought the transaction under the Model Law, inevitably raised the question whether the condition had been satisfied or not. The Mexican proposal would remove that element from the Law, but the Commission had still to ensure that a conditional payment did not fall within the scope of the Law until the bank had executed it and that a bank that executed a conditional payment order would not be subject to the rules in the Law concerning the timing of execution.

10. He suggested that the problem might be solved by the deletion of the words "but the condition is subsequently satisfied" and "thereafter" from the last paragraph of article 2(b) and the insertion of the word "thereafter" between the words "shall" and "be" in the penultimate line of that paragraph. The principle should be that the bank executing the conditional order did so outside the Law but that, once a payment order had been executed, it should come under the Law and be treated as unconditional.

11. Mr. ABASCAL ZAMORA (Mexico) said he supported the United Kingdom proposal.

12. Ms. KOSKELO (Observer for Finland) said that, while the United Kingdom proposal was an improvement, her delegation's problem was still unresolved. The Mexican proposal, as it was worded, gave the impression that, by executing a conditional payment order, a receiving bank would somehow be able to make the condition disappear for legal purposes, though that was hardly its intention.

13. The rights of the sender against a receiving bank which had executed a conditional payment - or had failed to do so - would be governed by a separate set of rules, and that must be made quite clear in the Model Law itself. To say that the Model Law would govern the payment order once a conditional payment order had been executed might well cause a misunderstanding, because the draft Model Law contained a provision to the effect that the rights and remedies under the Model Law were to be exclusive. It must be made clear that the Model Law did not interfere with the sender's rights against the receiving

(Ms. Koskelo, Observer for Finland)

bank, based on the fact that a payment order had been executed contrary to the conditions. Her delegation had no difficulty with the proposed text, as amended by the representative of the United Kingdom, provided that it was quite clear that the rights in question were not interfered with.

14. THE CHAIRMAN asked the observer for Finland whether she would be satisfied with the notion of an abstraction principle, i.e. if it were clearly understood that the obligation under the Model Law was completely independent of or abstracted from the underlying transaction.

15. Ms. KOSKELO (Observer for Finland) concurred.

16. Mr. SCHNEIDER (Germany) said that it might not be desirable to use the word "abstraction" in the sense of independence from underlying obligations, since there could be conditions which had nothing to do with such obligations. It might be better to refer specifically to the conditions laid down in a payment order by the originator or the originator's bank.

17. The Commission was discussing three separate problems. In the first place, it had been stated in the discussion that the Model Law applied only if a conditional payment order had actually been executed. If it were not executed, a different body of law would apply. That solution would be a regrettable one, since he believed that the Commission should try to include in the Model Law all the legal problems relating to conditional payments and that its sphere of application should be broadened accordingly.

18. The second problem was how to handle the offer of a conditional payment order under the Model Law. If the originator offered a conditional payment order to his bank, the choice was either to make the condition void or to apply article 6. In his own opinion, article 6 would not be applicable and the bank should be free to accept or reject a conditional payment order. Obstacles placed in the way of conditional payment orders would restrict the ability of banks to offer new types of service and such orders should be deemed payment orders under article 2.

19. The third problem was that of defining the duties of a bank that had accepted a conditional payment order. It must be made clear that, once a bank accepted a conditional payment order, its duty was to execute the payment and fulfil the condition. It would be better, therefore, to make no mention of conditional payment orders in article 2. They might, however, be mentioned in article 6, where it could be stated that a bank accepting such an order must do so expressly.

20. Mr. DE BOER (Netherlands) said he could accept the text proposed by the United Kingdom with the insertion of the word "unconditionally". It should be made clear that the receiving bank had executed the payment order unconditionally.

21. Mr. VASSEUR (Banking Federation of the European Community) said that the Commission did not seem favourably disposed to conditional payment orders,

(Mr. Vasseur, Banking Federation of the European Community)

upholding as it did the principle that payment orders were normally unconditional. However, since conditional payment orders existed and could not be ignored, a way must be found of first stating the principle and then qualifying it.

22. Two propositions had been put forward when the question was being discussed at the Working Group's twenty-first session in July 1990. The first was that conditional payment orders would fall outside the scope of the Model Law. That proposition had not won much support because, as had been said at the time, it was agreed as a general principle that, unless expressly decided otherwise, the parties had full freedom to derogate from the Model Law (article 3). The condition stipulated concerning a payment order was thus merely a derogation from the principle in the first sentence of article 2(b). The other proposition which had been adopted, stated that the occasional exception did not place the transaction as a whole outside the sphere of application of the Law and hence that the Law should be fully applied, especially the provisions concerning responsibility.

23. The Commission has not yet begun its consideration of article 3, which stated the principle of the contractual freedom of the parties to derogate from the provisions of the Law. He suggested, therefore, that it would be better to link conditional payment orders with that article. If that suggestion were accepted, then article 2(b) might be redrafted along the following lines: "'Payment order' means an instruction which is both unconditional, unless in application of article 3 below the sender's bank has agreed to execute a conditional order, provided that the condition has been actually satisfied, and is given by a sender to a receiving bank." The rest of the article would remain unchanged.

24. Mr. ABASCAL ZAMORA (Mexico) suggested, for the consideration of the Drafting Group, that wording such as the following might meet the concern expressed by the observer for Finland: "This law does not deal with the responsibility incumbent on the receiving bank which executes a conditional instruction as if it were a payment order."

25. Mr. BURMAN (United States of America) said he supported the initial Mexican proposal with the useful suggestions for clarification made by the representatives of the United Kingdom and the Netherlands and the observer for Finland. They would all help to achieve the separation of the parts of the commercial banking process concerned with the execution of payment orders and the conditional documentation and papers respectively. It was important that that separation should be carefully maintained, although he did not deny that some banks undertook and some customers requested conditional commercial transactions. He hoped, however, that representatives would do their best not to reopen basic structural issues and thus prolong the work of the Commission.

26. Mr. HUANG Yangxin (China) said that, if a receiving bank received a conditional payment order and believed that the condition might be satisfied after execution of the order, it should be free to execute the order on the understanding that it would be responsible for any consequences if the

(Mr. Huang Yangxin, China)

condition were not satisfied. He proposed that the words "when it was issued" at the end of the last sentence of article 2(b) be replaced by "when the conditions were satisfied" in order to avoid the possibility of liability due to the time-lag between the issuing of an instruction and the satisfaction of the condition attached to it.

27. The CHAIRMAN asked whether the Chinese proposal meant that the receiving bank thus placed in a situation of liability would be compensated but that such compensation would not fall within the scope of the Model Law.

28. Mr. HUANG Yangxin (China) said that, once the order had been executed, it would be deemed unconditional under the Model Law but continue to be regarded as conditional under the applicable law.

29. Mr. GREGORY (United Kingdom) said he thought there was general agreement that it should be made quite clear that, if a condition was stipulated by an originator, the Model Law in no way detracted from the responsibilities of the originator's bank in relation to the condition, but that no responsibilities in relation to the condition should be imposed on subsequent banks in the credit transfer chain. The thrust of the Finnish, Mexican and Netherlands proposals was thus to keep the part of the transaction involving the condition separate from the part in which the payment order was regarded as unconditional, without in any way denying that the condition existed. If separate rights with regard to conditional instructions were to be preserved, it was important that they should affect no parties other than the party sending the conditional payment order, the party receiving it and the latter's bank.

30. Ms. KOSKELO (Observer for Finland) said that, while the previous speaker's interpretation of her views was correct, she would like to add to the wording proposed by the delegation of the United Kingdom a sentence such as the following: "The Model Law shall not affect the rights of the sender of the conditional instruction vis-à-vis the bank that received and executed the conditional instruction."

31. Mr. ABASCAL ZAMORA (Mexico) said that his intention had been to state clearly that the Model Law did not cover the responsibilities of a bank in relation to a conditional instruction that it received and executed as though it were a payment order. Such responsibilities were covered by other laws.

32. The CHAIRMAN, recapitulating, said that the proposal by the delegation of Germany that two sets of rules be prepared, one for unconditional and the other for conditional payment orders - or, at least, endeavouring to accommodate the latter - was too ambitious and time-consuming. The proposal to amend article 6 to take account of the problem of conditionality was not feasible either, because of the changes which would then become necessary in subsequent articles.

33. There seemed, however, to be general agreement that the Model Law should concern itself with unconditional payment orders only but that, once executed,

(The Chairman)

a conditional order should be deemed to have become unconditional in relation to subsequent parties in the transaction and also, retroactively, in respect of the rights and obligations set forth in the Law. The conditional side would nevertheless remain subject to the applicable law and outside the scope of the Model Law. That point would be clarified by the additional sentence suggested by the observer for Finland.

34. The suggestion by the observer for the Banking Federation of the European Community that the problem of conditionality be dealt with under article 3 was not feasible in view of the agreement already reached by the Commission that conditional payment orders should be excluded from the purview of the Model Law. The suggested deletion of the phrase "but the condition is subsequently satisfied" from the last paragraph of article 2(b), while not ideal from the point of view of the German delegation, at least had the merit of distancing the Model Law from the vexed question of the satisfaction of conditions, without explicitly discouraging the inclusion of conditional payment orders within its scope.

35. Mr. DUCHEK (Observer for Austria) said that there appeared to be general agreement that, where a conditional payment order was deemed to have become unconditional on execution, the time-limits provided for in article 10 of the Model Law should not apply retroactively. From the drafting point of view, however, the retention of the phrase "when it was issued" did not seem to convey that principle sufficiently clearly.

36. Mr. GREGORY (United Kingdom) said he agreed that the problem was one of drafting rather than of principle.

37. Mr. LOJENDIO OSBORNE (Spain) said he was concerned about the process whereby a conditional payment was deemed to become unconditional. Conditionality was an integral part of a conditional payment order; it could not be abstracted away, but was necessarily passed on to all the banks involved in the credit transfer chain. The Model Law and the responsibilities stipulated by it should apply to a payment order executed by a bank regardless of conditionality and at all stages of the transaction.

38. The CHAIRMAN said that a conditional payment would be deemed to become unconditional merely for the purposes of the payment system and in order to bring it within the scope of the Model Law. No loss of conditionality through the operation of the Law was implied.

39. Ms. KOSKELO (Observer for Finland) said, with regard to the concern expressed by the observer for Austria about the phrase "when it was issued", that the Working Group had proceeded from the premise that a conditional instruction was not a payment order. It had thus been necessary to specify that, once executed, such an instruction would be dealt with as though it had been unconditional from the start so as to ensure that the sender of a conditional instruction had the same rights as the originator of a credit transfer. Her own suggestion that the word "thereafter" in the last clause of article 2(b), which would then read "the instruction shall thereafter be

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treated as if it had been unconditional when it was issued", was intended to deal with the problem raised by the observer for Austria.

40. Mr. POTYKA (Observer for Austria) said that his delegation, which still wished to delete the phrase "when it was issued", did not think that the insertion of the word "thereafter" was sufficient to convey the idea that the time-limits set out in article 10 did not apply to conditional instructions.

41. Mr. BERGSTEN (Secretary of the Commission) said that, in the first place, the assumption that a condition stipulated by an originator was one to be satisfied by the originator's bank had been explicit in the earlier texts of the Model Law, but was not explicit in the current one. Secondly, the current text did not adequately reflect what seemed to be a policy decision by the Commission that cases in which there was never a "clean" instruction, i.e. cases in which conditions were passed all the way down the credit transfer chain and in which the conditions had no effect on the law itself, but only on the factual situation, fell outside the purview of the Model Law.

42. As the observer for Finland had reminded the Commission, the Working Group had, after a long discussion, concluded that, in terms of the Model Law, a credit transfer situation was created at the moment when the originator's bank sent a clean payment order. The purpose of the clause "the instruction shall be treated as if it had been unconditional when it was issued" was to ensure that the originator of the conditional instruction would also be the originator under the Model Law.

43. Mr. DE BOER (Netherlands) said he wished to repeat an earlier proposal by his delegation that wording be added to the text to the effect that the provisions of the Model Law would apply to conditional payment orders to the extent that the conditional character of the payment order permitted.

44. The CHAIRMAN said that, although earlier texts of the paragraph under consideration had referred to the originator's bank, it should be borne in mind that certain conditions might be imposed on intermediary banks designated by the originator. For the time being, therefore, it would be wise to avoid the phrase "originator's bank" in the wording adopted. At the same time, attention should be paid to the relevant comments by the Secretariat (A/CN.9/346, pp. 14-15, para. 19) in connection with the problem of time-limits mentioned by the observers for Austria and Finland.

45. The discussion seemed to have reached a stage at which it might be appropriate to designate a drafting group to formulate a text, having regard to the points raised by the representatives of the Netherlands and the United Kingdom and the observers for Austria and Finland.

46. Mr. GREGORY (United Kingdom) said that, when a matter was referred to a drafting group the policy of the Commission regarding it should be made quite clear. The representative of the Netherlands had just introduced a new question that could not be resolved by the drafting group. However, his

(Mr. Gregory, United Kingdom)

delegation would find the procedure acceptable if the Commission were to discuss that question after the drafting group had produced wording to express what the Commission had already agreed.

47. The point made by the Secretary had been addressed in an earlier suggestion by the delegation of the Netherlands, namely, that the word "unconditionally" be inserted after the words "executes it" in the last paragraph of article 2(b). It was important that a bank receiving a conditional payment order to implement a transfer should issue a "clean" order. That was, he thought, the purport of the discussion, though it was not clearly brought out in the text before the Commission.

48. The CHAIRMAN suggested that a drafting group consisting of the representatives of the United Kingdom and Mexico and the observer for Finland should be set up to consider article 2(a), particularly the suggestion that the words "series of operations" be replaced by "series of payment orders", and that the wording of the phrase "intended to carry out the originator's payment order" be improved, if possible.

49. It was so agreed.

50. Mr. BISCHOFF (Observer for Switzerland) said that article 2(b)(i) should not govern the definition of a payment, since it referred to a part only of the consequences of a payment order. The point should be dealt with under article 4(6).

51. Mr. DE BOER (Netherlands) said he supported that suggestion and thought that article 2(b)(i) was superfluous.

52. Mr. BHALA (United States of America) said that article 2(b)(i) should be retained, since it was essential that the provision should be restricted to credit transfers and should not include debit transfers. In the discussion held the previous day on point-of-sale systems, the representative of the United Kingdom had said that both the sub-subparagraphs ((i) and (ii)) of article 2(b) should be retained, a view which his own delegation wholeheartedly supported.

53. Mr. KOMAROV (Union of Soviet Socialist Republics) said that the provision would be clearer if it stated that a payment order might be conveyed by any means of communication.

54. The CHAIRMAN said that, while the provision in article 2(b)(i) could be interpreted as covering that concern, the drafting group might be asked to consider whether some additional words could be added, such as "sent by the sender by any means", or whether that would raise new issues and might be unnecessary.

55. Mr. KOMAROV (Union of Soviet Socialist Republics) said he could accept that approach.

56. Mr. LE GUEN (France) said that the proposal by the representative of the USSR that it be stated in article 2(b) that the payment order might be conveyed "by any means" was too broad. It might result in banks being presented with payment orders in commercially unacceptable forms.

57. Mr. GREGORY (United Kingdom) said he agreed that the definition should refer to transfers by any means, but felt that that was already implicit in the text. If it was expressly stated, he did not think it implied that payment orders had to be accepted by a bank if made in an unacceptable form.

58. The CHAIRMAN said that the receiving bank could reject any payment order not made in proper form. He suggested that the point at issue should be referred to the drafting group.

59. It was so agreed.

60. Mr. GREGORY (United Kingdom) said that sub-subparagraph (ii) of article 2(b) specified that the instruction must not provide that payment was to be made at the request of the beneficiary. The intention had been to exclude debit transfers, but it might also have the effect of excluding credit transfers to a beneficiary who did not have an account and where the beneficiary's bank was instructed to "pay on application". To overcome that problem, he proposed the inclusion of the following new paragraph after article 2(b)(ii):

> "Subparagraph (ii) shall not prevent an instruction from being a payment order merely because it directs the beneficiary's bank to hold funds for a beneficiary that does not maintain an account with it until the beneficiary requests payment."

61. Mr. SCHNEIDER (Germany) said that the Commission had already defined a condition as an uncertain event. The situation described by the representative of the United Kingdom was a condition.

62. Mr. GREGORY (United Kingdom) said that it was not a condition of the kind that had been discussed earlier. It was simply a method of payment.

63. Mr. SCHNEIDER (Germany) said that, in the situation envisaged by the representative of the United Kingdom, payment by the beneficiary's bank was conditional on application by the beneficiary. It was a matter of some significance.

64. Mr. ADEDIRAN (Nigeria) said he supported the United Kingdom proposal. The receiving bank was not obliged to accept a payment order that it could not carry out. In general, as many conditions as possible should be accommodated within the Model Law.

65. Mr. GREGORY (United Kingdom) said that, if his proposed new paragraph began "Nothing in this paragraph shall prevent ...", the conditionality difficulty might be resolved.

66. The CHAIRMAN suggested that the United Kingdom proposal might be accepted in substance and its form referred to the drafting group.

67. It was so decided.

68. The CHAIRMAN invited the Commission to consider article 2(c).

69. Mr. POTYKA (Observer for Austria) said the word "issuer" should be replaced by "sender" in article 2(c), since the word sender was defined in article 2(e).

70. The CHAIRMAN recalled that the representative of Canada had suggested that "send" should be used in place of "issue" throughout the text of the Model Law.

71. Mr. BHALA (United States of America) said he supported the views of the observer for Austria and the representative of Canada.

72. Mr. GREGORY (United Kingdom) said that, while he had no objection to the replacement of "issuer" by "sender" in article 2(c), he did have reservations about the general substitution of "send" for "issue" throughout the text of the Law. There might be cases, such as telephoned instructions, or written instructions given over a counter, when the instruction was issued but not sent.

73. Mr. GRIFFITH (Observer for Australia) said he agreed that "sender" should replace "issuer" in article 2(c). However, he shared the view of the representative of the United Kingdom that the substitution should not be carried out passim.

74. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he agreed with the views of the observer for Austria.

75. Ms. KOSKELO (Observer for Finland) said that the Working Group had deliberately chosen the word "issue" to express the idea of giving a payment order.

76. Mr. LIM (Singapore) agreed with the observer for Finland. To eliminate the term "issue" would cause confusion.

77. Mr. ERIKSSON (Observer for Sweden) said he was strongly opposed to the use of the word "sender" in article 2(c) as it might cause new problems. The text as drafted was quite acceptable.

78. Mr. AL-NASSER (Observer for Saudi Arabia) said that, since the term "issuer" was preferable in Arabic, he favoured retention of the text as it stood.

79. The CHAIRMAN said that "issue" implied the giving of an instruction. "Send" had no such connotation, and might, moreover, exclude instructions that were conveyed by hand. As he heard no counter-argument from the proposers of the change, he took it that the Commission wished to retain the word "issuer".

80. It was so decided.

81. The CHAIRMAN invited the Commission to consider article 2(e).

82. Mr. GRIFFITH (Observer for Australia) suggested that article 2(e) should refer to "a" person who issues ..., not "the" person, since the issuer of the payment order might be more than one person.

83. Mr. GREGORY (United Kingdom) said he thought that the issuer would always be only one person, even in the case of a series of separate orders by the originator and any sending bank. "A" person would still be a single person, but he had no objection to the change.

84. The CHAIRMAN said he took it that the Commission wished to adopt the suggestion by the observer for Australia and amend article 2(e) accordingly.

85. It was so decided.

86. The CHAIRMAN invited the Commission to consider article 2(d).

87. Mr. BURMAN (United States of America) suggested that the discussion of article 2(d) should be postponed until after article 2(f) had been discussed, because the definition of the beneficiary was dependent on the definition of a bank.

88. It was so agreed.

The meeting rose at 12.25 p.m.